Supreme Court, U.S.
FILED

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No. _____

In the

Supreme Court of the United States

October Term, 1998

SHARON RILEY,

Petitioner,

-v-

ST. LOUIS COUNTY OF MISSOURI; RONALD A. BATTELLE, St. Louis County Chief of Police, STYGAR AND SONS CHAPEL, d/b/a Stygar Family of Funeral Services; ROBERT ROBINSON, St. Louis County Police Officer,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

HENRY T. VOGT, ESQUIRE
Counsel of Record
130 South Bemiston
Suite 705
St. Louis, Missouri 63105
(314) 862-3736
Attorney for Petitioner

Appellate Service: Curry & Taylor (800) 222-8738/Appellate@webtv.com

QUESTIONS PRESENTED

(1) Whether a police officer forcing a coffin lid open and photographing the corpse of a teenage suicide victim without the knowledge or permission of the boy's mother and displaying those photographs to the public, violated a fundamental right embodied in the United States Constitution of the mother to perform a decent and ceremonious burial of her son.

(2) Whether the police officer's actions in delaying the teenager's burial so he could photograph the victim and later use the photographs at so-called "gang awareness" public meetings to imply the victim died of gang violence, is so reprehensible it shocks the conscience or offends judicial notions of fairness or human dignity and violates the substantive due process rights of the Petitioner.

(3) Whether the appropriation by persons acting under color of law of photographs of the Petitioner's son and later publication of those photographs at public gatherings was a violation of Petitioner's right to privacy and property rights in her son's body in violation of the United States Constitution.

(4) Whether the State of Missouri's sovereign immunity statute prohibiting suit against the St. Louis County Police Department and its agents for intentional torts violates Appellant's right to due process under both the United States Constitution and the Constitution of the State of Missouri.

(5) The State of Missouri's sovereign immunity statute prohibiting suit against the St. Louis County Police Department and its agents for intentional torts violates appellant's right to due process under both the United States Constitution and the Constitution of the State of Missouri.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sharon Riley prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, which held the Respondents violated no law or any Constitutional rights whatsoever when Respondents waited for Petitioner to leave her son's funeral service and then held open the lid of his coffin to photograph the body for later display at so-called police-sponsored "gang awareness" public meetings.

OPINIONS BELOW

The opinion of the panel of the Eighth Circuit Court of Appeals was filed August 13, 1998 and is reprinted in Appendix A and reported at 153 F. 3d 627 (1998). The decision of the U.S. District Court is reprinted in Appendix B and is unreported.

JURISDICTION

The Petitioner filed her Petition for Rehearing and Suggestions in Support for Rehearing en banc on August 25, 1998. The Eighth Circuit denied Petitioner's suggestion for rehearing and petition for rehearing on September 30, 1998. A copy of the order denying rehearing is reprinted in Appendix C. This petition is being filed within 90 days of the Eighth Circuit's order denying the petition for rehearing.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; ...

STATUTES INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, suggests, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Mo. Rev. Stat. § 537.600 (1998):

> Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain

in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

(1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles or motorized vehicles within the course of their employment;

(2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition. In any action under this subdivision wherein a plaintiff alleges that he was damaged by the negligent, defective or dangerous design of a highway or road, which was designed and constructed prior to September 12, 1977, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

(2) The express waiver of sovereign immunity in the instances specified in subdivisions (1) and (2) of subsection 1 of this section are absolute waivers of sovereign immunity in all cases within such situations whether or not the public entity was functioning in a governmental or proprietary capacity and whether or not the public entity is covered by a liability insurance for tort.

3 The term "public entity" as used in this section shall include any multi-state compact agency created by a compact formed between this state and any other state which has been approved by the Congress of the United States. Sovereign immunity, if any, is waived for the proprietary functions of such multistate compact agencies as of the date that the Congress of the United States approved any such multi-state compact.

4. Pursuant to the prerogative of the general assembly to declare the public policy of the state in matters concerning liability in tort for public entities, the general assembly declares that prior to September 12, 1977, there was no sovereign or governmental immunity for the proprietary functions of multi-state compact agencies operating pursuant to the provisions of sections 70.370 to 70.440, RSMo, and 238.030 to 238.110, RSMo, including functions such as the operation of motor vehicles and the maintenance of property, involved in the operation of a public transit or public transportation system, and that policy is hereby reaffirmed and declared to remain in effect.

5. Any court decision dated subsequent to August 13, 1978, holding to the contrary of subsection 4 of this section erroneously interprets the law and the public policy of this state, and any claimant alleging tort liability under such circumstances for an occurrence within

> five years prior to February 17, 1988, shall in addition to the time allowed by the applicable statutes of limitation or limitation of appeal, have up to one year after July 14, 1989, to file or refile an action against such public entity and may recover damages imposed by the common law of this state as for any other person alleged to have caused similar damages under similar circumstances.

Mo. Rev. Stat. § 58.460 (1998):

> Whenever an inquest shall be held, or any case in which the coroner is involved, if there be no relative or friend of the deceased, nor any person willing to bury the body, nor any person whose duty it is to attend to such burial, the coroner shall order the embalming of the body, procure an inexpensive plain coffin, and cause a grave to be dug and the body to be conveyed thereto and buried, or shall cause the body to be cremated and shall cause the cremated remains to be disposed of in a lawful manner in a marked grave. It shall be the duty of the coroner, in so doing, to avoid all unnecessary expense, and to render to the commission an accurate statement of all money expended by him for such purpose; and the county commission shall make to him a reasonable allowance for his actual expenses in procuring the coffin, transporting the deceased to the grave, digging the grave and burying the body, or in obtaining such cremation and disposition of the cremated remains in a marked grave; and also a reasonable allowance, according to the circumstances, for his own time and services in attending to such preparations and burial, or to such cremation and disposition in a marked grave.

Mo. Rev. Stat. § 542.271 (1998):

1. A warrant may be issued to search for and seize, or photograph, copy or record any of the following: (1) Property, article, material, or substance that constitutes evidence of the commission of a criminal offense; or

   (2) Property which has been stolen or acquired in any other manner declared an offense by chapters 569 and 570, R.S.Mo.; or

   (3) Property owned by any person furnishing public communications services to the general public subject to the regulations of the public service commission if such person has failed to remove the property within a reasonable time after receipt of a written notice from a peace officer stating that such property is being used as an instrumentality in the commission of an offense; or

   (4) Property for which possession is an offense under the law of this state; or

   (5) Property for which seizure is authorized or directed by any statute of this state; or

   (6) Property which has been used by the owner or used with his acquiescence or consent as a raw material or as an instrument to manufacture or produce any thing for which possession is an offense under the laws of this state.

2. A warrant may be issued to search for and rescue a kidnapped person.

3. A warrant may be issued to search for any person for whom a valid felony arrest warrant is outstanding.

4. A warrant may be issued to search for and seize any deceased human fetus or corpse, or part thereof.

5. The provisions of sections 542.261 to 542.296 and section 542.301 shall prevail over any rules and regulations promulgated by any state governmental agency, commission or board, to the contrary notwithstanding.

STATEMENT OF THE CASE

The body of 18-year-old Anthony Riley was found shot to death in September, 1995. The St. Louis County (Missouri) Police Department's investigation into the shooting found it was a suicide.

Following the investigation, authorities released the body to Tony's mother, Sharon Riley. Mrs. Riley then arranged for burial services with Stygar & Sons Funeral Home. A service was planned at the funeral home with another service to follow at a nearby church with burial at a St. Louis cemetery.

An intelligence officer with County Police was sent to the funeral home to observe and photograph the funeral services without Mrs. Riley knowledge or permission.

Employees of the funeral home either stood by or assisted the officer when the photographs were taken. None of the employees told Mrs. Riley the photographs were being taken even though she was waiting outside for her son's casket to be loaded into a hearse for the drive to the funeral mass.

Photographs of the corpse were then used in a slide presentation given by the officer at a so-called "gang

awareness" seminar conducted by the department at a school in Tony's neighborhood. When a slide depicting Tony's corpse was shown to the audience, the officer told the assembled students and parents that Tony died as a result of gang violence.

Mrs. Riley learned of the photographic surveillance of her son's funeral after a relative saw the slide presentation at the school.

Mrs. Riley then filed her complaint seeking declaratory and injunctive relief and damages under 42 U.S.C. § 1983 alleging the county police policy of conducting surveillance at funeral services and conspiring with funeral home operators to photograph corpses for later publication was unconstitutional. The complaint also contained pendent state claims of negligence and breach of contract against Stygar.

The district court dismissed Mrs. Riley's complaint for failure to state a claim. The Eighth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

This Case Is One Of First Impression For The Federal Courts Concerning The Violation Of The Right Of Sepulchre – The Right Of The Next Of Kin To Perform A Decent And Ceremonious Burial Of Their Loved Ones – That Has Not, But Should Be Settled By This Court.

I. A POLICE OFFICER FORCING A COFFIN LID OPEN AND PHOTOGRAPHING THE CORPSE OF A TEENAGE SUICIDE VICTIM WITHOUT THE KNOWLEDGE OR PERMISSION OF THE BOY'S MOTHER AND DISPLAYING THOSE PHOTOGRAPHS TO THE PUBLIC, VIOLATED A FUNDAMENTAL RIGHT EMBODIED IN THE UNITED STATES CONSTITUTION OF THE MOTHER TO PERFORM A DECENT AND CEREMONIOUS BURIAL OF HER SON.

This case presents an issue of first impression to the federal courts of a right and corresponding duty as old as humanity – burial of our dead.

Missouri, like most other states, imposes a duty and corresponding rights on a surviving spouse or next of kin to provide for preparation of the body, funeral and burial. § 58.460 RSMo (1998). "The imposition of the duty to bury the dead carries with it the conferring on the person charged therewith of such rights as may be necessary to a proper performance." *Rosenblum v. New Mt. Sinai Cem. Ass'n*, 481 S.W.2d 593, 594 (Mo. Ct. App. 1972).

Mrs. Riley had a legal obligation to bury her son and a corresponding common law right of sepulchre recognized

under Missouri law as the right of the next of kin to perform a ceremonious and decent burial of the nearest relative – and an action for breach of that right. *Crenshaw v. O'Connel*, 150 S.W.2d 489, 492 (Mo. App. 1941).

> "We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and unobstucted; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a willful violator responsibility for the uttermost consequences of his act."

Wilson v. St. Louis & S.F.R. Co., 150 S.W2d 489, 492 (Mo. App. 1941) quoting with approval the Supreme Court of Wisconsin in *Koerber v. Patek*, 123 Wis. 453, 102 N.W. 40, (S.C. Wis. 1905).

II. THE POLICE OFFICER'S ACTIONS IN DELAYING THE TEENAGER'S BURIAL SO HE COULD PHOTOGRAPH THE VICTIM AND LATER USE THE PHOTOGRAPHS AT SO-CALLED "GANG AWARENESS" PUBLIC MEETINGS TO IMPLY THE VICTIM DIED OF GANG VIOLENCE, IS SO REPREHENSIBLE IT SHOCKS THE CONSCIENCE OR OFFENDS JUDICIAL NOTIONS OF FAIRNESS OR HUMAN DIGNITY AND VIOLATES THE SUBSTANTIVE DUE PROCESS RIGHTS OF THE PETITIONER.

This Court has held that the Due Process Clause of the U.S. Constitution protects individuals against two types of government action. *U.S. v. Salerno*, 481 U.S. 739, 747 (1987). So-called "substantive due process" prevents the government from engaging in conduct that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952). Or interfering with the rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937).

Mrs. Riley's claim concerns her duty and obligations to bury her son free from interference by the police. As such, Mrs. Riley's claim is rooted in basic human rights and the attendant absence of formal exactitude this court found is not unusual or even a regrettable attribute of constitutional provisions. *Rochin* at 169.

Thus Mrs. Riley's claim fits squarely under the provision of Supreme Court Rule 10(c) governing review of certiorari of an important federal question that has not, but should be settled by this Court.

The list of "fundamental" or "implicit rights" guaranteed by our Constitution defy categorical description but have involved matters relating to marriage, procreation, contraception, family relationships, child rearing and education. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

The right and corresponding duty to bury a loved one, to give a decent and ceremonious burial without police lurking in funeral homes like grave robbers, stealing the last vestige, the last thin veneer of civilization, the last collective ounce of human dignity from our souls is certainly a right all civilizations have extend to both the living and the dead.

The covenant of marriage, the use of contraception, our concept of family units and the values we teach our children are inviolable rights inherent in a civilized and free society.

As a nation, we condemned a regime that allowed its people to drag the naked corpses of our soldiers through the streets of a foreign capital as barbaric. We were powerless, as a nation to stop such atrocities yet every American knew such barbaric behavior was a crime against humanity without consulting our Constitution.

In much the same way, Mrs. Riley knows it was wrong and a crime against humanity for a county police officer to wait in the shadows to photograph her son's corpse as she sat waiting outside for his body to be taken to a funeral mass. Mrs. Riley couldn't protect her son from harm while he was alive but she ask this court to grant certiorari to decide whether federal law allows her to protect Tony in death.

III. THE APPROPRIATION BY PERSONS ACTING UNDER COLOR OF LAW OF PHOTOGRAPHS OF THE PETITIONER'S SON AND LATER PUBLICATION OF THOSE PHOTOGRAPHS AT PUBLIC GATHERINGS WAS A VIOLATION OF PETITIONER'S RIGHT TO PRIVACY AND PROPERTY RIGHTS IN HER SON'S BODY IN VIOLATION OF THE UNITED STATES CONSTITUTION.

This court has recognized that notions of substantive due process contained within the Fourteenth Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives. *Eagle v. Morgan*, 88 F3d 620, 625 (8th Cir. 1996).

This court has acknowledged that the exact boundaries of this right to privacy are, to say the least, unclear. *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202, 206 (3d Cir. 1991) *cert denied*, 502 U.S. 1095 (1992).

"To violate [a person's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." *Alexander v. Peffer*, 993 F.2d 1348 (8th Cir. 1993).

In her complaint, Mrs. Riley alleged county police conspired with the funeral home to conduct surveillance resulting in the photographs being taken of the corpse without Mrs. Riley's knowledge or permission. County Police then displayed slides of the corpse at public gatherings and labeled Tony's death gang-related.

Such disclosures are both a shocking degradation and an egregious humiliation to Mrs. Riley since the dead cannot be libeled or slandered. Mrs. Riley, however, had an expectation that when the police finished their investigation into his death and released his body to her for burial, the police would not bother her in her grief.

Mrs. Riley's had a legitimate expectation of privacy since § 542.271 RSMo (1998) sets out requirements for police to seek warrants to photograph certain items. Under Missouri law, a warrant may issue for seizure of a corpse but no provision is made under the law for photographing a corpse.

More importantly, Mrs. Riley had a fundamental right to expect the funeral services for her boy would not come under police surveillance. The State no longer had an interest in the disposal of Tony's corpse once the police had concluded their investigation into his death. Mrs. Riley could legitimately expect her son's remains would be afforded at least the same treatment as any rapist, child molester or serial killer put to death by the State. The next of kin of the State's capital victims are allowed to bury their dead without interference from the State.

Even our bible teaches us the Romans allowed Mary to bury the corpse of Jesus without interference from the government.

To hold there is no expectation of privacy in the burial of our dead would mean the corpse of any head of state or soldier given a twenty-one gun salute could be photographed to sell breakfast cereal or cold remedies without the permission or knowledge of the next of kin.

Such results ignore the rule of law. Such results turn our police into bands of thugs to be held beneath contempt. Such results must surely "shock [] the conscience" or "offend

judicial notions of fairness ... or ... human dignity." *Weiler v. Purket*, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc).

IV. THE STATE OF MISSOURI'S SOVEREIGN IMMUNITY STATUTE PROHIBITING SUIT AGAINST THE ST. LOUIS COUNTY POLICE DEPARTMENT AND ITS AGENTS FOR INTENTIONAL TORTS VIOLATES APPELLANT'S RIGHT TO DUE PROCESS UNDER BOTH THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSOURI.

Missouri, by statute[1] and common law[2], has given Mrs. Riley the duty and obligation to dispose of her son's body and an action at law for interference with that right.

The right of the next of kin to bury their dead has been described by Missouri courts as a "property" or "quasi-property right" since under the law the next of kin is entitled to possession and control of the body.[3]

Mrs. Riley's complaint states the corpse of her son was photographed without her knowledge or permission. The photograph was taken by a county police officer after she was escorted from the funeral home, as is the custom for the last family member to view the body.

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[1] §194.220 RSMo (1998)

[2] The common law right of sepulchre is the "right of the next of kin to perform a ceremonious and decent burial of the nearest relative – and an action for the breach of that right." *Galvin v. McGilley Memorial Chapels*, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987)

[3] See also The American Law Institute Restatement of Torts, 2d, § 868, comment a.

As she waited outside for the coffin lid to be closed by Stygar employees and taken to a waiting hearse to the funeral mass, the county police officer took photographs of the corpse.

Obviously there was a delay in the funeral services while the photographs were taken. Such a delay was an interference with the funeral services and actionable under the property formulation as a violation of due process rights.

V. THE STATE OF MISSOURI'S SOVEREIGN IMMUNITY STATUTE PROHIBITING SUIT AGAINST THE ST. LOUIS COUNTY POLICE DEPARTMENT AND ITS AGENTS FOR INTENTIONAL TORTS VIOLATES APPELLANT'S RIGHT TO DUE PROCESS UNDER BOTH THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF MISSOURI.

Mrs. Riley is not unmindful of the admonition of the court in *Paul v. Davis*, 424 U.S.693, 703 (1976) that the Fourteenth Amendment is not to be a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Whatever characterization is made of Mrs. Riley's right of sepulchre, she is prohibited under Missouri's sovereign immunity law[4] from bringing suit against county police in state court.

As such, Mrs. Riley is being deprived of due process under the law.

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[4] Sec § 537.600 RSMo

CONCLUSION

For the foregoing reason, the Petitioner respectfully requests that the decision of the Eighth Circuit be reversed.

Respectfully submitted by,

Henry T. Vogt
Attorney for Petitioner
130 S. Bemiston, Ste. 705
St. Louis, MO 63105
314-862-3736

(Any footnotes trail opinion)

153 F.3d 627; 1998

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2424

Sharon Riley,
Appellant,

v.

St. Louis County of Missouri; Ronald A. Battelle, St. Louis County Police Chief; Stygar and Sons Chapel, doing business as Stygar Family of Funeral Services; Robert Robinson, St. Louis County Police Officer,
Appellees.

December 10, 1997, Submitted
August 13, 1998, Filed

JUDGES: Before BOWMAN[1] FLOYD R. GIBSON, and LOKEN, Circuit Judges.

OPINION BY: FLOYD R. GIBSON

OPINION:

FLOYD R. GIBSON, Circuit Judge.

Sharon Riley brought this suit against St. Louis County, Missouri; St. Louis County Police Chief, Ronald A. Battelle; St.

Louis County Police Officer, Robert Robinson (collectively, "the Department"); and Stygar and Sons Chapel, doing business as Stygar Family of Funeral Services ("Stygar," or collectively, "Appellees"). In count I, Riley sought relief under 42 U.S.C. § 1983 (1994) for Appellees' alleged violations of her Fourth and Fourteenth Amendment rights. In counts II and III, Riley alleged pendent state claims of negligence and breach of contract against Stygar. The district court[2] dismissed count I with prejudice based on Riley's failure to state a claim. See Fed. R. Civ. P. 12(b)(6). After declining to exercise its supplemental jurisdiction, the district court dismissed counts II and III without prejudice. See 28 U.S.C. § 1367(c)(3) (1994). For the reasons set forth below, we affirm.

I. BACKGROUND

When reviewing a Rule 12(b)(6) dismissal for failure to state a claim, we look only to the facts alleged in the complaint and construe those facts in the light most favorable to the plaintiff. See Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 556 (8th Cir. 1998). In Riley's First Amended Complaint, Riley states that her son, Anthony Riley, committed suicide on September 6, 1995 at the age of eighteen years old. Riley contracted with Stygar for a funeral package for her son. Riley contends that Stygar conspired with the St. Louis County Police Department to violate her Fourth and Fourteenth Amendment rights by allowing the Department to photograph the deceased, without Riley's knowledge or permission, while the deceased remained in Stygar's lawful possession and control. Specifically, Riley claims that Officer Robert Robinson, acting under Chief Ronald Battelle's authority and control, photographed the deceased as he lay in his coffin after the funeral services ended. Riley further contends that the Department later displayed these photographs at a public gathering and commented that the decedent's involvement in gang-related activities had caused his death.

As a result, Riley filed a three-count complaint against Appellees. In count I, Riley claimed that the Appellees' actions violated section 1983 by denying her[3] Fourth n4 and Fourteenth Amendment rights. In counts II and III, Riley raised state law claims of breach of contract and negligence against Stygar. Appellees moved to dismiss count I for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The district court granted Appellees' motion and dismissed count I with prejudice and, after declining to exercise its supplemental jurisdiction, dismissed counts II-III without prejudice. Riley appeals the dismissal of her complaint.

I. DISCUSSION

We review de novo the district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See Double D Spotting Serv., Inc., 136 F.3d at 557. Applying the same standard as the district court, we accept the complaint's factual allegations as true and construe the complaint in the light most favorable to the plaintiff. See id. We affirm a Rule 12(b)(6) dismissal if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Id. (internal quotation and citation omitted).

Riley first argues that Appellees' conduct violated her Missouri common law right of sepulchre and that the district court erred in failing to recognize the right of sepulchre as a constitutionally protected property interest. We disagree.

"Section 1983 relief is predicated on the denial of a right or interest protected by the Constitution." Dover Elevator Co. v. Arkansas State Univ., 64 F.3d 442, 445 (8th Cir. 1995) (internal quotation and citation omitted). Riley alleges that Appellees deprived her of her property without due process of law in violation of the Fourteenth Amendment. "Analysis of either a procedural or substantive due process claim must begin with an

examination of the interest allegedly violated." Id. at 445-46. Section 1983 does not create substantive rights, see Wilson v. Garcia, 471 U.S. 261, 278, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985); rather, state law establishes the property interest while federal constitutional law determines whether the state law property interest rises to a constitutionally protected property interest. See Dover Elevator Co., 64 F.3d at 446.

Riley urges this court to recognize a constitutionally protected property interest based upon Missouri's common law right of sepulchre.[5] However, "Missouri courts have abandoned the early fiction that the cause of action for interference with the right of sepulchre rested on the infringement of a quasi property right of the nearest kin to the body." Lanigan v. Snowden, 938 S.W.2d 330, 332 (Mo. Ct. App. 1997) (internal quotation and citation omitted). Instead, Missouri courts base the cause of action on the mental anguish of the person claiming the right of sepulchre. See id. Nonetheless, we need not consider whether Riley's right of sepulchre constitutes a constitutionally protected property interest because Riley fails to allege facts sufficient to support her claim that Appellees violated her right to sepulchre. Our analysis of the Missouri common law right of sepulchre reveals that the deprivation of this right typically involves a physical intrusion, mishandling, or manipulation of the deceased's body. See, e.g., Golston v. Lincoln Cemetery, Inc., 573 S.W.2d 700, 703 (Mo. Ct. App. 1978); Crenshaw v. O'Connell, 235 Mo. App. 1085, 150 S.W.2d 489, 493 (Mo. Ct. App. 1941); Wilson v. St. Louis & S.F.R. Co., 160 Mo. App. 649, 142 S.W. 775, 777 (Mo. Ct. App. 1912). In the instant case, Riley does not allege any physical insult to the deceased nor any interference with the visitation, funeral, or burial. We therefore conclude that photographing the deceased's body after the visitation and later displaying the photograph at a public assembly did not deprive Riley of her right of sepulchre under Missouri law. As such, Riley fails to state a claim upon which relief can be granted under section

1983. See Parratt v. Taylor, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981).

Riley next argues that Appellees' photographing the deceased, displaying the picture at a public assembly, and making slanderous comments regarding the deceased's alleged gang activities violated her substantive due process rights as well as her right to privacy. We disagree.

"Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1986) (internal citations and quotations omitted). A substantive due process claim can be stated two different ways. One, substantive due process is violated when the state infringes "fundamental" liberty interests without narrowly tailoring that infringement to serve a compelling state interest. See Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998) (en banc). Two, substantive due process is offended when the state's actions either "shock[] the conscience" or "offend[] judicial notions of fairness . . . or . . . human dignity." Id. (internal quotation and citation omitted). We are generally hesitant to extend substantive due process into new arenas. See id.

In the present case, Riley has failed to allege either type of substantive due process claim. First, no fundamental liberty interest of Riley has been infringed because Riley's right for the Department to refrain from photographing the deceased, displaying his picture at a public assembly, and making slanderous comments regarding the deceased's alleged gang activities is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Reno v. Flores, 507 U.S. 292, 303, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993) (internal quotation and citation omitted). Second, we cannot conclude that the Department's actions, despite being

insensitive and the result of poor judgment, rise to the level of sufficiently outrageous conduct that shocks the conscience. Therefore, Riley has not alleged a violation of her constitutional right to substantive due process.

Turning to Riley's right to privacy claim, "the Supreme Court has recognized that notions of substantive due process contained within the Fourteenth Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives." Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996). One aspect of this right to privacy encompasses an individual's interest in avoiding disclosure of personal matters and has been characterized as the right to confidentiality. See id. "This protection against public dissemination of information is limited and extends only to highly personal matters representing the most intimate aspects of human affairs." Id. (internal quotation and citation omitted). "To violate [Riley's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." Id. (internal quotation and citation omitted).

Here, although Appellees' behavior was inappropriate, we cannot conclude that these actions violated Riley's right to privacy. Riley allowed her son's remains to be viewed at the visitation; therefore, Riley had no legitimate expectation that this information would be kept confidential. See Eagle, 88 F.3d at 625. Moreover, regarding Riley's claim that the slanderous comments deprived her of her "right to privacy in the memory of her son and her right to see that his remains are treated in a dignified and respectful manner," Appellant's Add. at 9, we find that Riley fails to identify any tangible liberty or property interest, and "it is well established that defamation or injury to reputation by itself does not state a constitutional deprivation." Brayman v. United States, 96 F.3d 1061, 1066 (8th Cir. 1996).

As such, Riley has failed to allege a violation of her constitutional right to privacy.

III. CONCLUSION

After a thorough review of the record and Riley's remaining arguments, n6 we are convinced that they are without merit. Accordingly, for the reasons stated, we affirm the district court's dismissal of count I with prejudice for Riley's failure to state a claim under section 1983. We also affirm the district court's dismissal of counts II and III without prejudice based on the district court's decision not to exercise its supplemental jurisdiction.

----------Footnotes----------

n1 The Honorable Pasco M. Bowman became Chief Judge of the United States Court of Appeals for the Eighth Circuit on April 18, 1998.

n2 The HONORABLE FREDERICK R. BUCKLES, United States Magistrate Judge for the Eastern District of Missouri.

n3 We note that, to the extent that Riley's complaint alleged that Appellees' actions violated her deceased son's constitutional rights, those claims were properly dismissed because section 1983 does not provide a cause of action on behalf of a deceased for events occurring after death. See, e.g., Guyton v. Phillips, 606 F.2d 248, 251 (9th Cir. 1979).

n4 As Riley has not briefed any Fourth Amendment issues, we find that she has abandoned the Fourth Amendment claims on

appeal. See Fed. R. App. P.28(a)(3) & (6); Pet Milk Co. v. Boland, 185 F.2d 298, 302 (8th Cir. 1950).

n5 The common law right of sepulchre is the "right of the next of kin to perform a ceremonious and decent burial of the nearest relative--and an action for the breach of that right." Galvin v McGilley Memorial Chapels, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987).

n6 Riley argues that, one, the district court, by dismissing her claims against St. Louis County, has precluded her from seeking legal redress against the County because Missouri's sovereign immunity bars Riley's claim against the County in state court and that this violates her procedural due process rights. Second, Riley contends that the district court erred in finding that she failed to allege sufficient facts that Appellees conspired to deprive Riley of her constitutional rights.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION
No. 4:96CV1105 FRB

SHARON RILEY,

Plaintiff

v.

ST. LOUIS COUNTY, MISSOURI et al.,

Defendants.

MEMORANDUM AND ORDER

Presently pending before the Court are defendant Stygar & Sons Chapel's Motion to Dismiss (filed July 9, 1996/Docket No. 9);[1] defendants St. Louis County and Ronald Battelle's Motion to Dismiss Plaintiff's First Amended Complaint (filed November 27, 1996/Docket No. 35); defendant Robert Robinson's Motion to Dismiss First Amended Complaint (filed January 2, 1997/Docket No. 46); and plaintiff's Motion for Leave to File Second Amended Complaint (filed January 16, 1997/Docket No. 49) . All matters are pending before the undersigned United States Magistrate Judge, with consent of the parties, pursuant to 28 U.S.C. § 636(c).

Presently before the Court is plaintiff's First Amended Complaint brought, through counsel, pursuant to 42 U.S.C. § 1983, in which plaintiff alleges that defendants violated plaintiff's constitutional rights as protected by the Fourth and Fourteenth Amendments, Plaintiff also alleges state torts of negligence and breach of contract, which are raised in this forum pursuant to this Court's supplemental jurisdiction under

28 U.S.C. § 1367(a}. Defendants are St. Louis County, Missouri; Ronald Battelle, St. Louis County Police Chief; Robert Robinson, St. Louis County Police Officer; and Stygar & Sons Chapel, a/b/a Stygar Family of Funeral Services .

I. Background

Plaintiff claims that her eighteen-year-old son committed suicide on September 6, 1995. Plaintiff thereafter contracted with defendant Stygar & Sons Chapel, a funeral home, for various services, including the embalming and preparation of her son's body for viewing and burial, plaintiff claims that after the body was embalmed, it remained in the custody and control of Stygar & Sons and that Stygar & Sons permitted defendant Robinson of the St. Louis County Police Department to enter the funeral home and photograph the body of plaintiff's son. Plaintiff claims that the photographing occurred before, during or after visitation services held for her son and was conducted without the knowledge or consent of plaintiff. Plaintiff claims that defendant Robinson has produced, and continues to produce at public gatherings and to news media, copies of the photograph of plaintiff's son with commentary regarding the son's alleged involvement in qang-related activities which caused his death.

Plaintiff claims that these actions were conducted pursuant to St. Louis County Police Department policy which permits unauthorized and illegal surveillance activities by conspiring with funeral home operators to violate citizens' right of sepulcher and allows the subsequent use of the fruits of such surveillance to defame the subject matter therein for the pecuniary gain of the police department and funeral homes, In Count I of her First Amended Complaint, plaintiff claims that this action violated her constitutional rights as protected by the Fourth and Fourteenth Amendments, In Counts II and III plaintiff raises state claims of negligence and breach of contract, respectively, against defendant Stygar & Sons,

Defendants now move to dismiss plaintiff's First Amended complaint arguing that plaintiff has failed to state a claim upon which relief can be granted inasmuch as plaintiff has failed to allege facts sufficient to state a constitutional violation. Plaintiff has responded to the various motions to dismiss.

If it is beyond doubt that a plaintiff cannot prove any set of facts in support of her claim that would entitle her to relief, a complaint must be dismissed. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) . In determining such motions, the Court must assume that all of plaintiff's factual allegations are true and view plaintiff's complaint and all reasonable inferences therefrom in a light most favorable to the plaintiff. Kizer v. Curators of the University of Missouri, 816 F. Supp. 548, 550 (E,D. Mo. 1993) .

II. Section 1983 Claims Against All Defendants

Plaintiff claims, on behalf of herself and her deceased son, that the actions of the defendants violated their constitutional rights as protected by the Fourth and Fourteenth Amendments.

As a preliminary matter, the undersigned notes that 42 U.S.C. § 1983 does not provide a cause of action on behalf of the deceased arising from actions occurring after death. See, e.g., Guyton v. Phillips 606 F.2d 248, 251 (9th Cir, 1979), cert. denied 445 U.S. 916 (1980); Whitehurst v. Wright, 592 F.2d 834, 840 (5th Cir. 1979) Therefore, to the extent plaintiff claims that the actions alleged here violated her deceased son's constitutional rights, those claims should be dismissed.

A. Fourteenth Amendment Claims

1. Right to Sepulchre

Plaintiff claims that the defendants' conduct Violated her "right to sepulchre." Defendants argue that because there is no federal constitutional right to sepulchre, plaintiff has failed to state a claim under 42 U.S.C. § 1983 upon which relief can be granted

The undersigned notes that plaintiff cites no federal authority defining a constitutional right to sepulchre, but instead relies on Missouri case law and statutes to support her claim that she enjoys a property right in the remains of deceased relatives. See Galvin v. McGillev Memorial Chapels, 746 S.W.2d 588, 591 (Mo. Ct. App. 1987) (citing Crenshaw v. O'Connel, 150 S.W.2d 489, 492 (Mo. Ct. App, 1941); Wilson v. St. Louis & S.F.R. Co.142 S. W. 775, 777 (Mo. Ct. App. 1912)} (right of next of kin to perform ceremonious and decent burial of decedent); Golston v Lincoln Cemetery Inc., 573 S.w.2d 700 (Mo. Ct. App. 1978) (allowing claim by nearest kin of emotional distress and mental anguish from mistreatment of decedent's body); Mo. Rev, Stat, § 194.220 (right to control disposal of decedent's body) . While plaintiff claims that this authority recognizes a "right of sepulchre," that term is used inconsistently throughout Missouri case law and primarily is used as an umbrella term for those rights listed above. See Calvin, 746 S.W.2d at 591. The gravamen of plaintiff's claim is that the aggregate of those rights granted by Missouri law to relatives of a deceased in the body of the decedent rises to the level of a property interest in the decedent's body and thus is protected by the Due Process Clause of the Fourteenth Amendment.

In Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) and Whaley v. County of Tuscola, 58 F.3d 1111 (6th Cir.), cert. denied, U.S. . 116 S. Ct. 476 (1995), the Sixth Circuit

found Ohio law to grant a bundle of rights, akin to property rights, in a decedent's body to the relatives of the deceased. In Brotherton, the Sixth Circuit determined that Ohio law recognized a possessory interest in a deceased relative's body (citing Everman v. Davis, 561 N.E.2d 547. appeal dismissed, 539 N.E.2d 163 (Ohio App. 1989)); allowed a claim for the disturbance of a deceased relative's body (citing Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430 (Ohio App. 1986)); and granted the right to control the disposal of a deceased relative's body (citing Ohio Rev. Code § 2108.02(B)) Brotherton, 923 F.2d at 480-82. The court held that the aggregate of rights granted by the State of Ohio to the relative of a deceased in the body of the decedent, regardless of the labels given to such rights, rises to the level of a "legitimate claim of entitlement" in the decedent's body, protected by the Due Process Clause of the Fourteenth Amendment, Id.

Assuming without deciding that Missouri law grants plaintiff a property right in the body of her deceased son, plaintiff nevertheless fails to allege facts sufficient to support a claim that she was deprived of this right without due process of law in violation of the Fourteenth Amendment. For plaintiff to assert a valid due process claim, she must assert some deprivation of a right protected by the Fourteenth Amendment. See Parratt v. Taylor, 451 U.S. 527, 535 (1981) . In each of the cases cited by plaintiff in support of her argument that defendants deprived her of the property right in her deceased son's body, the deprivation involved a physical interference with or intrusion upon the corpse in one way or another. In Galvin, the corpse of the decedent was switched with another corpse and the wrong corpse was subsequently delivered for a memorial service, 746 S.W.2d at 589-90. In Golston the deceased was buried in a shallow grave and not slandered by defendants' actions, the claim should be dismissed. See, e.g., Guyton 606 F.2d at 251 (§ 1983 does not provide cause of action on behalf of deceased arising from actions occurring after death); Whitehurst, 592 F.2d at 840 (same) .

The undersigned notes, however, that in her responses to the various motions to dismiss, plaintiff claims that the alleged defamatory comments have invaded her right to privacy and thus that the defamation has caused her injury. 42 U.S.C. § 1983 does not provide a remedy for abuses that do not violate federal law. Alexander v. Peffer, 993 F.2d 1348, 1349 (8th Cir. 1993) . Therefore, tortious conduct, even when performed under color of state law, does not rise to the level of a constitutional violation. Id. at 1350. *"[P]oor* judgment [does] not warrant the transformation of a possible state tort into one of 'constitutional magnitude." Id. (citing Davis III v. Bucher, 853 F.2d 718, 720 (9th Cir. 1988)) .

Defamation or injury to reputation is a tort actionable under state law but is not a constitutional violation. Siegert v. Gilley 500 U.S. 226, 233 (1991); Brayman v. United States 96 F.3d 1061, 1066 (8th Cir. 1996) . For defamation to rise to the level of a constitutional violation, the alleged defamatory statements must have caused plaintiff to be deprived of some more tangible liberty or property interest so as to allow her to invoke the protections of the Due Process Clause of the Fourteenth Amendment. Paul, 424 U.S. at 712; Gunderson v. Schlueter, 904 F.2d 407, 409 n.4 (8th Cir. 1990) ; Dodd v. Port Smith Special School District No. 100, 666 F. Supp. 1278 1283 -84 (W.D. Ark. 1987) . The facts as alleged by plaintiff are insufficient to make such a claim that the defamation violated her constitutional rights.

In her responses to the motions to dismiss, plaintiff claims that the defamation caused her to be deprived of her "right to privacy in the memory of her son and her right to see that his remains are treated in a dignified and respectful manner," and that these rights are tangible interests as "foreseen by the court in Paul that would support a Section 1983 claim." As discussed above, plaintiff has failed to allege facts sufficient to state a claim that she was deprived of her legal claim of entitlement to her son's body arguably recognized

under Missouri law. Thus, plaintiff has failed to allege a property interest sufficient to raise a claim of defamation to the level of a constitutional violation. As to plaintiff's claim that the alleged defamation violated her right of privacy in the memory of her son, the undersigned questions whether such a right is a "tangible" property or liberty interest to bring plaintiff's claim within the protections of the Fourteenth Amendment.[2] Plaintiff cites no authority supporting her argument that this right to privacy is such a tangible interest, and the Court is aware of none.

In addition, the undersigned notes that the Supreme Court has emphasized that 'personal rights found in [the constitutional] guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty[,] '" Paul, 424 U.S. at 713 (citing Palko v. Connecticut. 302 U.S. 319. 325 (1937)) , such as matters relating to marriage, procreation, contraception, family relationships, and child rearing and education, Id. Inasmuch as plaintiff does not allege that defendants violated such a fundamental right or that defendants' conduct "restrict[s her] freedom of action in a sphere contended to be 'private,'" id., plaintiff's claim that the alleged defamatory statements violated her right to privacy, raised for the first time in response to the defendants' motions to dismiss, fails to state a constitutional violation and should be dismissed,

B. Fourth Amendment Claims

Plaintiff claims that defendants' conduct violated her Fourth Amendment rights. Through a reading of her First Amended Complaint, it appears that plaintiff claims that defendant Robinson's act of photographing the body of plantiff's deceased son at the funeral home constituted illegal photographic surveillance of the funeral service in violation of the Fourth Amendment .

To determine whether the alleged conduct violates the Fourth Amendment, the Court must determine if the plaintiff had a subjective expectation of privacy in the funeral services that society would recognize as objectively reasonable- See Wabun-Inini v. Sessions, 900 F.2d 1234 1239-40 (8th Cir. 1990 (citing Katz v. United States, 389 U.S. 347, 361 (1967) ; California v. Ciraolo, 476 U.S. 207, 211 (1986) ; Oliver v. United States, 466 U.S. 170, 177 (1984)) . "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected-" Katz, 389 U.S. at 351. Assuming arguendo that plaintiff had a subjective expectation of privacy in the funeral services of her son, such expectation in the circumstances here is not one "that society is prepared to recognize as reasonable." Katz, 389 U.S. at 361 (Harlan, J. , concurring) .

The facts, as alleged by plaintiff in her First Amended Complaint, show that plaintiff contracted with a third party, Stygar & Sons, for services relating to the funeral of her son including preparation of the body for "viewing." plaintiff placed the remains of her son in the custody and control of Stygar & Sons and its employees, who were individuals unknown to plaintiff. Finally, plaintiff was unaware that any photographic surveillance took place. To determine whether a person has a legitimate expectation of privacy, consideration should be given to 1) whether the party had a possessory interest in the things seized or the place searched; 2) whether the party has the right to exclude others from that place; 3) whether the party exhibited a subjective expectation that the place would remain free from governmental intrusion; **4)** whether the party took normal precautions to maintain the party's privacy; and 5) whether the party was legitimately on the premises. Depugh v. Penning 888 F. supp. 959, 974 (N.D. Iowa 1995) (citing Rawlings v. Kentucky 448 U.S. 98, 105 (1980) ; United States v. Gomez, 16 F.3d 254, 256 (8th Cir. 1994);

United States v. Nabors, 761 F.2d 465, 469 (8th Cir. 1985) ; United States v. Haydel, 649 F.2d 1152, 1155 (5th Cir. 1981)) ,

Applying these factors to the circumstances here, plaintiff's expectation of privacy in the funeral service of her son was not objectively reasonable. First, plaintiff did not have a possessory interest in the premises at stygar & Sons chapel and was, at most, a visitor to the premises. A person's legitimate presence on the searched premises, however, is insufficient, without more, to assert a Fourth Amendment claim. DePugh, 888 F, Supp. at 974 (citing Rakas v. Illinois, 439 U.S. 128, 142-43 (1978) ; United States v. Ford, 34 F.3d 992, 995 (11th Cir. 1994) ; United States v. Garcia, 741 F.2d 363, 366 (11th Cir. 1984) ; United States v. Antone, 753 F.2d 1301, 1306 (5th Cir. 1985)). To the extent plaintiff may claim she nevertheless possessed the right to exclude others from the funeral service, the fact that Robinson was present at the service such presence to which the plaintiff now objects -- shows that plaintiff failed to take precautions to maintain the privacy of the service. Finally, the undersigned notes that plaintiff alleges in her complaint that Stygar & Sons was acting under color of state law inasmuch as it was "duly licensed under Missouri state law for the preparation and disposal of dead bodies[.]" (First Amd. Compl. at para. 16.) Therefore, to expect that the premises would be free from governmental intrusion, when plaintiff claims the facility itself is empowered by the government, would be unreasonable.

Therefore, because plaintiff did not have a legitimate expectation of privacy in the funeral services of her deceased son on the premises of stygar & Sons, plaintiff has failed to state a claim that defendants' conduct violated her rights under the Fourth Amendment

C. Conspiracy

Plaintiff claims that defendant Stygar & Sons conspired with the other defendants by allowing photographic and other surveillance of the body of plaintiff's deceased son while the body was in the lawful control and possession of Stygar & Sons. Beyond this conclusory allegation, plaintiff does not allege any facts supporting this claim. Facts demonstrating complicity have to be alleged in order to maintain a conspiracy claim. Spelling v. Westhoff, 972 F.2d 199, 208 (8th Cir. 1992), cert. denied, U.S., 113 S. Ct. 977 (1993) . See also Rogers v. Bruntrager 841 F.2d 853, 856 (8th Cir. 1988) (conspiracy claim requires allegations of specific facts showing "'meeting of minds" among alleged conspirators . Further, inasmuch as the underlying action alleged by plaintiff does not rise to the level of a constitutional violation, it cannot be said that defendants conspired to so deprive plaintiff of her constitutional rights. See, e.g., Larson v. Miller, 76 F.3d 1446, 1456 (8th Cir. 1996) .

Therefore, plaintiff's claim that defendants conspired to deprive plaintiff of her constitutional rights should be dismissed for failure to state a claim.

III. Remaining State Law Claims

Inasmuch as the Court will dismiss all claims over which it has original jurisdiction, the undersigned declines to exercise supplemental jurisdiction over plaintiff's remaining state law claims. 28 U.S.C. § 1367(c) (3) .

IV. Motion for Leave to File
Second Amended Complaint

A review of plaintiff's proposed Second Amended Complaint shows it not to cure the deficiencies as discussed above. Therefore, inasmuch as the Court determines plaintiff's claims as set out in her proposed Second Amended Complaint

to be futile, the Court will deny plaintiff leave to amend her complaint.

Therefore,

IT IS HEREBY ORDERED that defendant Stygar & Sons Chapel's Motion to Dismiss (Docket No. 9); defendants St. Louis County and Ronald Battelle's Motion to Dismiss Plaintiff's First Amended Complaint (Docket No. 35); and defendant Robert Robinson's Motion to Dismiss First Amended Complaint (Docket No. 46) are granted .

IT IS FURTHER ORDERED that Count I of plaintiff's First Amended Complaint is dismissed with prejudice for failure to state a claim upon which relief can be granted.

IT IS FURTHER ORDERED that Counts II and III of plaintiff's First Amended Complaint are dismissed without prejudice pursuant to 28 U.S.C. § 1367(c) (3) .

IT IS FURTHER ORDERED that plaintiff's Motion for Leave to File Second Amended Complaint (Docket No. 49) is denied.

IT IS FURTHER ORDERED that all other motions which remain pending in this cause are denied as moot.

UNITED STATES MAGISTRATE JUDGE
Dated this 4th day of April, 1997.

Footnotes

[1]Although this motion is directed to plaintiff's original complaint, the undersigned notes that in a Memorandum to Clerk filed December 6, 1996, defendant informed the Court that the Motion to Dismiss as filed to the original complaint is to be considered refiled as to plaintiff's First Amended Complaint.

[2] "Tangible. Having or possessing physical form. Capableof being touched or seen; perceptible to the touch; tactile; palpable; capable of being possessed or realized; readily apprehensible by the mind; real; substantial." Black's Law Dictionary 1456 (6th ed. 1990).

Sharon Riley, Appellant, v. St. Louis County of Missouri, et al., Appellees.

No. 97-2424EMSL

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2424

Sharon Riley,
Appellant,

v.

St. Louis County of Missouri; Ronald A. Battelle, St. Louis County Police Chief; Stygar and Sons Chapel, doing business as Stygar Family of Funeral Services; Robert Robinson, St. Louis County Police Officer,
Appellees.

September 30, 1998, Decided

4:96-cv-1105 (FRB).

Original Opinion of August 13, 1998, Reported at:

OPINION: Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 1998

(2)

No. 98-1020

FILED
JAN 27 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHARON RILEY,
Petitioner,

vs.

ST. LOUIS COUNTY, MISSOURI;
RONALD BATTELLE, ST. LOUIS COUNTY POLICE CHIEF;
ROBERT ROBINSON, ST. LOUIS COUNTY POLICE OFFICER;
and STYGAR AND SONS CHAPEL
D/B/A STYGAR FAMILY OF FUNERAL SERVICES,
Respondents.

OPPOSITION OF RESPONDENT STYGAR AND SONS CHAPEL D/B/A STYGAR FAMILY OF FUNERAL SERVICES TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GARY P. PAUL, COUNSEL OF RECORD
BRINKER & DOYEN, L.L.P.
120 S. Central, Suite 700
St. Louis, Missouri 63105
(314) 863-6311
(314) 863-8197 (fax)

Attorneys for Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

1388

QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by Petitioner, would be presented for review in this case:

1. Whether Petitioner has presented the Court with any question set out in the Petition for Writ of Certiorari as to Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services pursuant to Supreme Court Rule 14-1(a).

2. Whether the District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that 42 U.S.C.§ 1983 does not provide a cause of action on behalf of the deceased for acts occurring after death.

3. Whether the District Court properly dismissed Petitioner's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Petitioner has no constitutionally protected right of sepulchre.

4. Whether the District Court properly dismissed Petitioner's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because Petitioner failed to allege sufficient facts or cause of action to support her claim that she was deprived of any property right or right of sepulchre under Missouri common law.

5. Whether the District Court properly dismissed Petitioner's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because tortious conduct of defamation or invasion of privacy does not rise to the level of a constitutional deprivation.

6. Whether the District Court properly dismissed Petitioner's Amended Complaint pursuant to Federal Rule of Civil Proce-

dure 12(b)(6) because Petitioner did not allege or identify a recognized substantive due process right.

7. Whether the District Court properly dismissed Petitioner's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the allegations of conspiracy were conclusory in nature and were not set forth with sufficient definiteness.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The list of parties contained in the caption of the Petition for Writ of Certiorari is substantially correct. Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services is a family owned business that has not issued shares to the public. Respondent Stygar has no company, subsidiary, or affiliate that has issued shares to the public. Respondent Stygar has no parent or subsidiary companies.

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1. Petitioner has not presented the Court with any question set out in the Petition for Writ of Certiorari as to Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services pursuant to Supreme Court Rule 14-1(a).

2. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that 42 U.S.C. § 1983 does not provide a cause of action on behalf of the deceased for acts occurring after death.

3. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that Petitioner has no constitutionally protected right of sepulchre.

4. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that Petitioner failed to allege sufficient facts or cause of action to support her claim that she was deprived of any property right or right of sepulchre under Missouri common law.

5. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that tortious conduct of defamation or invasion of privacy does not give rise to the level of a constitutional deprivation.

6. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 because Petitioner did not allege or identify a recognized substantive due process right.

7. The District Court properly dismissed Petitioner's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because the First Amended Complaint failed to state a cause of action upon which relief could be granted pursuant to 42 U.S.C. § 1983 in that the allegations of conspiracy were conclusory in nature and were not set forth with sufficient definiteness.

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Riley v. St. Louis County, Missouri, No. 4:96CV01105FRB (U.S.D.Ct. E.D.Mo. May 31, 1996), *aff'd*, 153 F.3d 627 (8th Cir. 1998) 6

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Federal Rule of Civil Procedure 12(b)(6) i,ii,iv,v,4,5

PERCEIVED MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

The District Court dismissed Petitioner's Section 1983 claims in the First Amended Complaint for failure to state a claim upon which relief could be granted. (Petition for Writ of Certiorari, Appendix, 9a-19a). All Respondents had filed Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Joint Appendix A-1 to A-13; A-62 to A-71; A-86 to A-87; A-92 to A-101). For unstated reasons, Petitioner has not deemed it appropriate to provide the Court with the pleading, i.e. the Amended Complaint, which forms the basis of the present Petition for Writ of Certiorari. (Joint Appendix A-53 to A-61).

Petitioner's statement of the case should consist of the allegations contained in the Amended Complaint as the "facts material to consideration of the questions presented..." Supreme Court Rule 14-1(g). While Respondent does not wish to unnecessarily burden the Court with objections to the statement of the case, Respondent also does not want to give the Court the impression Respondent agrees that Petitioner's statement of the case is *in haec verba* with the Amended Complaint. Indeed, Respondent has the obligation to address any perceived misstatement of fact in the Petition. Supreme Court Rule 15-2.

Respondent Stygar sets forth the following perceived misstatements in Petitioner's statement of the case:

- Paragraph 1 of the statement of the case does not have direct corollary in the Amended Complaint. (Petition for Writ of Certiorari at 7).

- Paragraph 2 states that Petitioner arranged for burial services with Respondent Stygar which is reasonably compatible with the Amended Complaint. The other statements in paragraph 2 are not contained in the Amended Complaint. (Petition for Writ of Certiorari at 7).

- Paragraph 3 asserts an intelligence officer with County Police was sent to the funeral home to observe and photograph the funeral services without Petitioner's knowledge or permission. While the Amended Complaint does aver that a police officer conducted photographic and other surveillance of the deceased without the permission of Petitioner, the other alleged facts are, at best, difficult to read in the Amended Complaint. (Petition for Writ of Certiorari at 7).

- As to paragraph 4, there are no allegations in the Amended Complaint that employees of Respondent Stygar "stood by" when the photographs were taken. There are no allegations in the Amended Complaint to the effect that no employees told Petitioner the photographs were being taken even though she was waiting outside for her son's casket to be loaded into a hearse for the drive to the funeral mass. (Petition for Writ of Certiorari at 7).

- As to paragraph 5, while the Amended Complaint avers the photographs were shown as "public gatherings", there are no allegations in the Amended Complaint that there was a slide presentation at a so-called "gang awareness" seminar conducted by the department at a school in the deceased's neighborhood. (Petition for Writ of Certiorari at 7-8).

- Paragraph 6 indicates that Petitioner learned of the photographic surveillance of her son's funeral after a relative saw the slide presentation at the school. Respondent is unable to locate any averment in the Amended Complaint to support the statement. (Petition for Writ of Certiorari at 8).

Petitioner concludes that the District Court dismissed Petitioner's Complaint for failure to state a claim. (Petition for Writ of Certiorari at 8). The District Court dismissed the Section 1983 claims (Count I) with prejudice for failure to state a claim upon which relief can be granted. (Petition for Writ of Certiorari

at 19a). The District Court dismissed without prejudice the state common law counts (Counts II and III) pursuant to 28 U.S.C. § 1367(c)(3). (*Id.*)

Respondent also perceives other apparent misstatements. Petitioner advises the Court: "A police officer forcing a coffin lid open and photographing the corpse of a teenager suicide victim...violated a fundamental right embodied in the United States Constitution..." (Petition for Writ of Certiorari at iii). There is no allegation in the Amended Complaint that a police officer forced open a coffin lid.

Similarly, the Petition relates: "The police officer's actions in delaying the teenager's burial so he could photograph the victim and later use the photographs for 'so-called gang awareness' public meetings...is so reprehensible it shocks the conscience..." (Petition for Writ of Certiorari at iii). There is no statement in the Amended Complaint that the police officer's actions delayed the teenager's burial and, as pointed out above, the phrase "gang awareness" is not contained in the Amended Complaint.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE:

1. PETITIONER HAS NOT PRESENTED THE COURT WITH ANY QUESTION SET OUT IN THE PETITION FOR WRIT OF CERTIORARI AS TO RESPONDENT STYGAR AND SONS CHAPEL d/b/a STYGAR FAMILY OF FUNERAL SERVICES PURSUANT TO SUPREME COURT RULE 14-1(a).

2. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IN THAT 42 U.S.C. § 1983 DOES NOT PROVIDE A CAUSE OF ACTION ON BEHALF OF THE DECEASED FOR ACTS OCCURRING AFTER DEATH.

3. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IN THAT PETITIONER HAS NO CONSTITUTIONALLY PROTECTED RIGHT OF SEPULCHRE.

4. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C.

§ 1983 IN THAT PETITIONER FAILED TO ALLEGE SUFFICIENT FACTS OR CAUSE OF ACTION TO SUPPORT HER CLAIM THAT SHE WAS DEPRIVED OF ANY PROPERTY RIGHT OR RIGHT OF SEPULCHRE UNDER MISSOURI COMMON LAW.

5. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IN THAT TORTIOUS CONDUCT OF DEFAMATION OR INVASION OF PRIVACY DOES NOT GIVE RISE TO THE LEVEL OF A CONSTITUTIONAL DEPRIVATION.

6. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C. § 1983 BECAUSE PETITIONER DID NOT ALLEGE OR IDENTIFY A RECOGNIZED SUBSTANTIVE DUE PROCESS RIGHT.

7. THE DISTRICT COURT PROPERLY DISMISSED PETITIONER'S FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) BECAUSE THE FIRST AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF COULD BE GRANTED PURSUANT TO 42 U.S.C. § 1983 IN THAT THE ALLEGATIONS OF CONSPIRACY WERE CONCLUSORY IN NATURE AND WERE NOT SET FORTH WITH SUFFICIENT DEFINITENESS.

Petitioner has failed to set out any question in the Petition, or fairly included therein, as to Respondent Stygar which should be considered by the Court. Supreme Court Rule 14-1(a). Petitioner has set forth five reasons for granting the Writ. (Petition for Writ of Certiorari at 3i-iv). All reasons are based on the actions or omissions of the St. Louis County Respondents. (*Id.*) While Petitioner generally requests the decision of the Eighth Circuit to be reversed, Petitioner makes no specific demand as to Respondent Stygar. (Petition for Writ of Certiorari at 17).

In the event the Court determines that questions as to Respondent Stygar are before the Court, Respondent Stygar states the decisions of the District Court and the Eighth Circuit Court of Appeals correctly applied the law to the facts. Respondent Stygar would incorporate by reference those decisions. *Riley v. St. Louis County, Missouri, et. al.*, No. 4:96CV01105FRB (U.S.D.Ct. E.D.Mo. May 31, 1996), *aff'd* 153 F.3d 627 (8th Cir. 1998). (Petition for Writ of Certiorari, Appendix 1a-21a). There is no reason to restate their reasoning.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

Gary P. Paul, Counsel of Record
Brinker & Doyen, L.L.P.
120 S. Central, Suite 700
St. Louis, Missouri 63105
(314) 863-6311
(314) 863-8197 (fax)
Attorneys for Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services

CERTIFICATE OF SERVICE

Three copies of the Opposition of Respondent Stygar and Sons Chapel d/b/a Stygar Family of Funeral Services were mailed this _____ day of January, 1999, to Henry T. Vogt, Attorney for Petitioner, 130 S. Bemiston, Suite 705, St. Louis, Missouri 63105; and Christopher J. McCarthy, Attorney for Respondents St. Louis County, Missouri, Ronald Battelle, and Robert Robinson, County Government Center, 41 S. Central Ave., Clayton, Missouri 63105.